

Federal Court



Cour fédérale

Date: 20120419

Docket: T-1846-11

Citation: 2012 FC 461

Vancouver, British Columbia, April 19, 2012

PRESENT: The Honourable Madam Justice Snider

**IN THE MATTER OF ACCREDITED HOME LENDERS CANADA INC.
and an Application by the Minister of National Revenue
under section 225.2 of the *Income Tax Act***

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

**ACCREDITED HOME LENDERS
CANADA INC.**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister of National Revenue (Minister) applied to the Federal Court and obtained an *ex parte* Order dated November 16, 2011 (the Jeopardy Order), pursuant to s. 225.2 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the *Act*), against Accredited Home Lenders Canada Inc. [AHLIC]. In granting the Jeopardy Order, Justice O'Reilly was satisfied that there were reasonable grounds to believe that the collection of an amount assessed for tax by the Minister

against AHLC would be jeopardized by a delay in the collection of the amount. As permitted by the Jeopardy Order, the Minister served Requirements to Pay on a number of Canadian financial institutions and received funds in the amount of \$6,160,192.03 (the Funds). The Funds were credited to, and completely satisfied, AHLC's income tax debt for the 2010 taxation year.

[2] AHLC now seeks a review the Jeopardy Order, asking this Court to set aside the Jeopardy Order, and issue an Order requiring that the Funds be returned to AHLC.

[3] For the reasons that follow, I have determined that the Jeopardy Order should stand.

I. Background

[4] AHLC, a Canadian corporation, is described by the Minister as a "subprime residential mortgage lender". Accredited Home Lenders Inc. (Parent Company), a US corporation, is the 100% shareholder of AHLC. The Parent Company, a significant subprime mortgage company in the US, filed for bankruptcy in May 2009. A Trustee in Bankruptcy (Trustee) has been appointed. AHLC, although not in bankruptcy protection or insolvent, is in the process of winding up its business in Canada. In June 2011, the Parent Company withdrew over \$16 million from the bank account of AHLC, thereby reducing the common stock value from \$19,500,000 to \$1,843,324.

[5] The context of the Jeopardy Order is the current tax situation of AHLC. AHLC filed returns and paid taxes for the 2007 to 2009 tax years, claiming income of \$10,231,125. In AHLC's income tax filing for 2010, the company reported approximately \$19,562,133 of

income. The return has been assessed and the tax owing is \$6,132,014.84. AHLC has filed an objection to this assessment.

[6] At the same time as it filed its 2010 return, AHLC filed amended returns (Amended Returns) for 2007 to 2009 claiming losses of \$18,694,130; this is a net difference of \$28,925,255 from the originally-filed returns. On the basis of the Amended Returns, AHLC expected to be able to claim \$18,694,130 in non-capital losses to be carried forward and applied to the 2010 tax debt, resulting in no tax being payable for 2010. Accordingly, AHLC made no payment in respect of its 2010 tax filing. Unfortunately for AHLC, the Canada Revenue Agency [CRA] determined that the Amended Returns would be processed separately and refused to allow the carry forward for the 2010 tax year. As a result, even though AHLC may ultimately be entitled to a refund in respect of the 2007 to 2009 tax years, it is currently liable for a tax debt of \$6,132,014.84 for the 2010 tax year. This is the amount that is the subject of the Jeopardy Order.

II. Statutory Framework

[7] The original *ex parte* motion for the Jeopardy Order was brought under s. 225.2(2) of the *Act*, which provides that, upon such application, a judge “shall” authorize the Minister to take steps to collect any amount assessed under the *Act* where the judge “is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in the collection of that amount”. The “authorization” resulting from a successful application under s. 225.2(2) of the *Act* is commonly referred to as a “jeopardy order”. Where a judge has granted a jeopardy order, the taxpayer may

apply to the court to review the jeopardy order (*Act*, above at s 225.2(8)). The relevant provisions are as follows:

225.2(2) Notwithstanding section 225.1, where, on *ex parte* application by the Minister, a judge is satisfied that there are reasonable grounds to believe that the collection of all or any part of an amount assessed in respect of a taxpayer would be jeopardized by a delay in the collection of that amount, the judge shall, on such terms as the judge considers reasonable in the circumstances, authorize the Minister to take forthwith any of the actions described in paragraphs 225.1(1)(a) to 225.1(1)(g) with respect to the amounts.

...

(8) Where a judge of a court has granted an authorization under this section in respect of a taxpayer, the taxpayer may, on 6 clear days notice to the Deputy Attorney General of Canada, apply to a judge of the court to review the authorization.

225.2 (2) Malgré l'article 225.1, sur requête *ex parte* du ministre, le juge saisi autorise le ministre à prendre immédiatement des mesures visées aux alinéas 225.1(1)(a) à (g) à l'égard du montant d'une cotisation établie relativement à un contribuable, aux conditions qu'il estime raisonnables dans les circonstances, s'il est convaincu qu'il existe des motifs raisonnables de croire que l'octroi à ce contribuable d'un délai pour payer le montant compromettrait le recouvrement de tout ou parties de ce montant.

...

(8) Dans le cas où le juge saisi accorde l'autorisation visée au présent article à l'égard d'un contribuable, celui-ci peut, après avis de six jours francs au sous-procureur général du Canada, demander à un juge de la cour de réviser l'autorisation.

III. The Test on Review

[8] The parties agree on the test to be applied on the review of a jeopardy order under subsection 225.2(8) of the *Act*. As first described by Justice MacKay in *Minister of National*

Revenue v Satellite Earth Station Technology Inc (1989), 30 FTR 94, 89 DTC 5506 [*Satellite Earth*] (see also *Minister of National Revenue v Reddy*, 2008 FC 208 at paras 6 to 9, 329 FTR 13 [*Reddy*]), the test consists of two components. At the first step, the applicant (AHLC) bears the burden of establishing that there are reasonable grounds to doubt that the test required by s. 225.2(2) has been met. If the applicant satisfies its burden at this stage, the second stage of the test is engaged and the Minister has the ultimate burden to demonstrate that, on a balance of probabilities, it is more likely than not that collection would be jeopardized by delay.

[9] A third element must also be considered. Given that the initial motion for a jeopardy order is brought *ex parte*, there is a heavy burden on the Minister to make full and frank disclosure to the motions judge. Disclosure does not need to be perfect must be adequate or reasonable in the circumstances (see *Services ML Marengère Inc v Minister of National Revenue* (1999), 176 FTR 1 at para 63(5), 2000 DTC 6032)

IV. Analysis

[10] As part of this review application, AHLC provided two affidavits. The first was an affidavit of Mr. Christopher Gimpel, lead tax partner with the firm of Deloitte & Touche LLP for AHLC and the second was an affidavit of Mr. James Ransom, Vice President/Controller of AHLC. The Minister also submitted three affidavits. The first was an affidavit of Mr. James Corlett, Collections Officer with CRA, which affidavit was provided to Justice O'Reilly as part of the original application. The Minister, in direct response to the affidavits filed by AHLC on this motion, also submitted a further affidavit by Mr. Corlett and an affidavit of Ms. Akina Lam,

a Collections Officer with CRA. I have reviewed and considered all of the evidence before me on this review application and have also reviewed the material filed on the original application.

[11] The first step in my analysis is to determine whether AHLC can satisfy me that there are reasonable grounds to doubt that the test in s. 225.2(2) was met.

[12] As acknowledged by the parties, the key issue, in this review, is whether there were reasonable grounds to believe that AHLC would transfer the Funds to its US parent.

[13] The evidence before Justice O'Reilly must be considered in its totality. What was that evidence?

- AHLC does not believe that it has a tax debt. Stated differently, AHLC believes that it will be successful in challenging its assessments for 2007 to 2009, thereby ultimately providing a carry-forward loss to its 2010 tax return.
- In June 2011, apparently at the request of the Trustee of the Parent Company, AHLC transferred \$16 million to its US parent, thereby reducing the common stock value from \$19,500,000 to \$1,843,324 as of September 30, 2011.
- The Trustee of the Parent Company has requested the transfer of funds.

- Although AHLC is not insolvent, AHLC is in the process of liquidating its operations, meaning that, on a going-forward basis, it will not be earning income.
- The only assets of AHLC were highly liquid assets with financial institutions.
- AHLC had filed the Amended Returns showing losses from 2007-2009 of over \$18 million, whereas the previous tax returns had shown a profit of approximately \$10 million, for a net difference of almost \$29 million.
- AHLC was asked on a number of occasions to pay or provide security for the 2010 assessed liability, but refused even though it was not earning any interest on the Funds.
- After many years of on-time income tax filings, AHLC was two months late in filing its 2010 return.
- AHLC had a past history of paying its taxes in instalments or upon filing; in this case, no funds were paid toward the 2010 tax debt.

[14] While AHLC has now offered explanations for some of its actions and positions, it does not dispute the veracity of any of the above-noted facts. I acknowledge that, considered in isolation, each of the various facts may not have individually supported the CRA's conclusion that the 2010 tax debt was at risk. However, considered together, the facts paint a different

and negative picture. Sudden changes in how the company operated vis-à-vis CRA were understandably and reasonably taken as danger signs by CRA officials. The state of affairs with respect to the Parent Company could not be ignored. The refusal of AHLC to agree to provide security for the debt or to make full payment, subject to a refund with interest if subsequently repaid by CRA, appears illogical in the circumstances.

[15] In its efforts to show that I should doubt the reasonableness of the Jeopardy Order, AHLC's key evidence appears to be to the effect that AHLC would not transfer monies to the US in the face of tax obligations.

[16] Some of these statements were set out in the affidavit of Mr. Gimpel. Mr. Gimpel states that he told Mr. Corlett, in October 2010, that no funds would be transferred to the Parent Company until a positive tax ruling was obtained; the request of a tax ruling was not made until January 2012. One glaring problem with this statement is that, in spite of Mr. Gimpel's assurances to the contrary, AHLC did transfer \$16 million to the Parent Company in June 2011. Given the transfer of \$16 million, it was certainly not unreasonable for Mr. Corlett to discount Mr. Gimpel's "promise".

[17] An affidavit was also provided by Mr. Ransom. For the most part, Mr. Ransom's affidavit is not helpful or relevant to the question before me. The fact that AHLC was challenging the tax owed for a number of years and might ultimately be successful does not change the fact that the tax assessments for those years or for 2010 are valid. Tax assessments are valid until and unless successfully challenged (*Act*, above at s 152(8)).

[18] Mr. Ransom is correct in his statement that CRA is not “entitled to collect or demand security” for the 2010 tax debt. With all due respect to Mr. Ransom and to counsel who also made this argument to me, this misses the point. While CRA cannot legally demand the payment, AHLC was free to make such payment or give security to assuage the obvious concern of the CRA that further liquid assets of the company would be whisked into the hands of the Parent Company. The failure to provide security or payment was one more “sign” that AHLC wanted to keep the money liquid to facilitate a transfer of more money to the Parent Company.

[19] In his original affidavit, Mr. Corlett stated that he had been told by both Mr. Gimpel and Mr. Ransom that the Trustee “is pressing for payment”. The Minister acknowledges that the statement was too strongly worded. I agree. However, while the word “pressing” may have been an over-enthusiastic interpretation of what Mr. Corlett was told, the situation remains that both Mr. Gimpel and Mr. Ransom advised Mr. Corlett that the Trustee was looking to draw funds from AHLC. These facts were clearly set out in Mr. Corlett’s affidavit and are not disputed. Moreover, the desire of the Trustee to obtain further money from AHLC adds additional support for the decision to take action under s. 225.2(2) of the *Act*.

[20] The facts outlined above provide ample evidence that AHLC had the motivation and means to transfer the Funds to the Parent Company. Considered cumulatively, the evidence does not lead me to doubt the reasonableness of Justice O’Reilly’s conclusion that there were reasonable grounds to believe that collection of the 2010 tax debt of AHLC would be jeopardized by a delay in the collection of that amount. Accordingly, I find that AHLC has failed to meet its burden at the first stage of the analysis.

[21] In its written submissions, AHLC submitted that the Minister had failed to make full and frank disclosure. This argument was not pursued at the oral hearing. Having reviewed the material, I am satisfied that there was full and frank disclosure of all relevant and material facts to Justice O'Reilly.

[22] In conclusion, the application for review will be dismissed and the Jeopardy Order will be confirmed.

ORDER

THIS COURT ORDERS that:

1. The application for review is dismissed, with costs to the Minister; and
2. The Jeopardy Order is confirmed.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1846-11

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE
v ACCREDITED HOME LENDERS CANADA INC.

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: APRIL 16, 2012

**REASONS FOR ORDER
AND ORDER:** SNIDER J.

DATED: APRIL 19, 2012

APPEARANCES:

Mr. Jason Levine	FOR THE APPLICANT
Mr. Curtis Stewart	FOR THE RESPONDENT
Ms. Lisa Handfield	

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE APPLICANT
Deloitte Tax Law LLP Barristers and Solicitors Calgary, Alberta	FOR THE RESPONDENT